

BRENNAN
CENTER
FOR JUSTICE
TWENTY
YEARS

FIVE TO FOUR

Lawrence Norden, Brent Ferguson, and Douglas Keith

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INTRODUCTION

Super PACs. Dark Money. Multi-million dollar contributions. Unlimited corporate and union spending.

For many Americans these may seem like fundamental, if unfortunate, aspects of American elections. But the truth is that all of these things are very recent phenomena. Only a few years ago, there were no federal super PACs. The term “dark money” — spending by groups that hide the identity of their donors — had not been coined, because it was virtually non-existent. Corporations and unions were strictly limited in how they could spend in federal elections. Super-wealthy individuals could not donate millions to federal candidates and parties in a single election, because there were aggregate limits on contributions.

All of these new developments, and more that most Americans decry, can be directly or indirectly traced to just a few U.S. Supreme Court decisions issued in the last decade, each decided by a single vote. Four of nine justices strongly disagreed with these decisions, and if one more justice had joined them, our ability to regulate big money in politics, and to give ordinary Americans more of a voice in the political process, would be very different today.

In other words, the last few years of campaign financing are not “normal,” or “inevitable,” or “just the way things are.” To the contrary, in the modern era, they are the aberrant result of a single swing vote on the Supreme Court, which upended decades of carefully crafted campaign finance law, and they can be reversed.

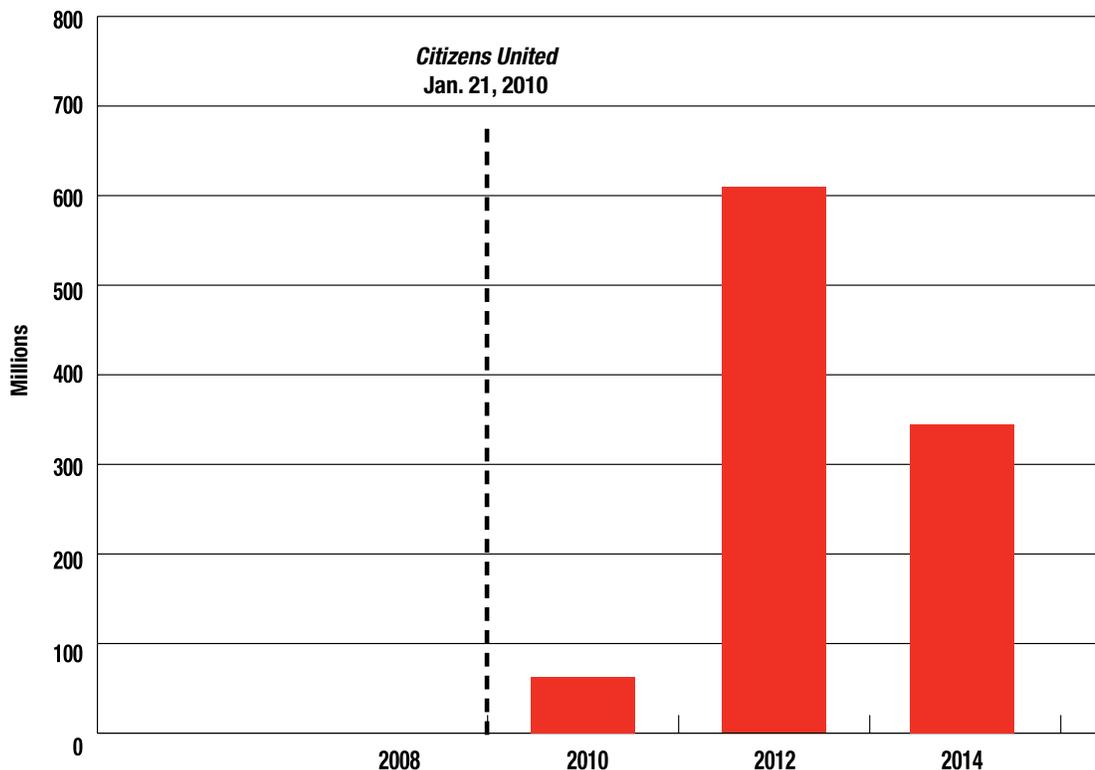
This paper details how six closely divided Supreme Court decisions in the last decade contributed to some of the most disturbing trends in American elections. It also shows how a new approach by just one Supreme Court justice could once again allow for commonsense regulations that ensure all Americans have a voice in the political process, and that a more representative, diverse group of candidates could competitively run for office without the support of a few super wealthy donors.

A. PERMITTING UNLIMITED OUTSIDE SPENDING THROUGH SUPER PACS

Sen. John McCain (R-Ariz.) has said that “super PACs . . . will destroy the political process. There will be scandals.”¹ Likewise, Sen. Lindsay Graham (R-S.C.) said that super PACs “are a necessary evil of the 2016 contest” and that whoever wins the presidential race should try to eliminate them; he has even proposed a constitutional amendment to overrule *Citizens United*.² There is a reason so many vilify super PACs. Simply put, super PACs have become the primary vehicles for the wealthy and corporations to spend unlimited money on political campaigns. Between 2010 and 2014, 195 donors and their spouses funded 60 percent of the \$1 billion in super PAC spending.³

Super PACs played no role in federal elections before 2010 because they didn’t exist. Their creation can be traced directly to *Citizens United* and a faulty assumption at the heart of the majority’s 5-4 decision: so-called independent election spending by non-candidate individuals and entities does “not give rise to corruption or the appearance of corruption.”⁴ Though the factual accuracy and precise meaning of that pronouncement are subjects of hot debate, the Court’s five-member majority later made clear that it is not willing to look at evidence that could suggest anything different.⁵ And months after *Citizens United*, a lower court concluded in *SpeechNow v. FEC* that if independent spending does not corrupt, there is no justifiable reason to limit contributions to groups that engage in independent election spending.⁶ That decision swept away longstanding federal limits and brought us “independent-expenditure-only PACs,” soon to be called super PACs.

Super PAC Spending by Election Cycle



Information from the Center for Responsive Politics⁷

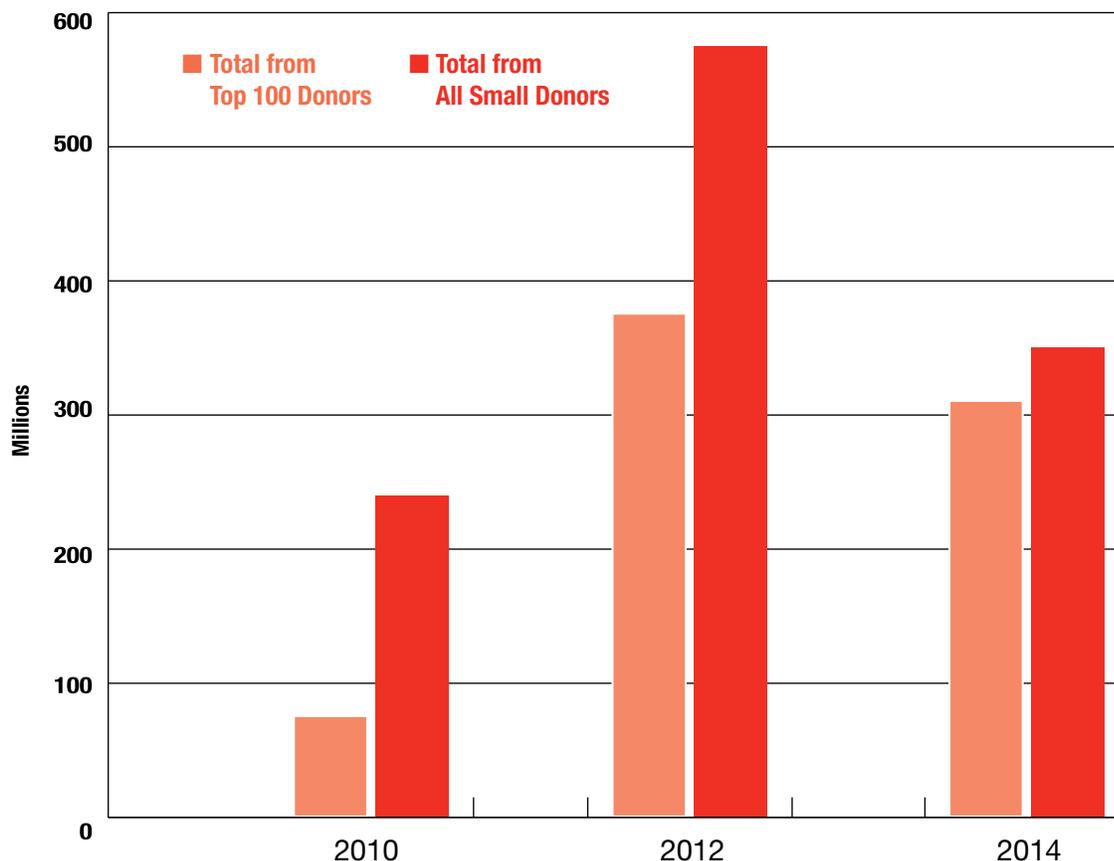
From the 1970s to 2010, the federal government limited individuals' contributions to PACs to \$5,000 per year. Thus, for most of the 35 years before *Citizens United*, independent spending, which was generally done through PACs rather than by individuals in their own names, was relatively low. Candidates almost always spent more money than outside groups supporting or opposing them.⁸

Prior to 2010, the main conduits for unlimited outside spending were so-called “527” groups, whose legal status was uncertain and who were, in any event, restricted in the types of ads they could run. 527s generally spent much less than both candidates and parties (even when their spending spiked, as it did in the 2004 presidential contest).⁹ With the legality of super PACs now unquestioned, and unlimited corporate and union spending permitted, independent spending in the last two cycles has dwarfed previous amounts. And, in some instances, super PACs have raised more money than the candidates themselves.¹⁰

These changes exacerbated the already-outsized political power wielded by a tiny sliver of Americans. The dominance of a small number of big donors has long grown at a rapid pace — 10 times faster than the growth of income inequality. From 1980 to 2010, the share of political contributions attributable to the top .01 percent of the voting-age population increased from approximately 15 percent to 30 percent.¹¹ But in just the first two years after *Citizens United*, when income inequality dipped slightly, the disproportionate influence of wealthy donors skyrocketed.¹² Between 2010 and 2012, the share of spending from this tiny group spiked from 30 to 40 percent of all political contributions, largely attributable to the rise of super PACs. According to research by the Sunlight Foundation, it grew even further in 2014.¹³

This shift in influence, away from ordinary citizens and toward an elite club of wealthy mega-donors, can be seen most clearly when we look at the relative size of spending from those mega-donors compared to small donors. In 2010, the year super PACs were created, the top 100 donors spent less than one third as much as the total contributions of small donors to federal candidates. By 2014, that drastically changed, with the spending of the top 100 donors almost equaling the total amount contributed to candidates by small donors.¹⁴

Political Contributions, 2010–2014



Information from the Center for Responsive Politics, the Federal Election Commission, and Politico.¹⁵

The biggest givers’ dominance of the campaign finance system may also be discouraging others from participating. For the first time since 1990, the total number of donors in 2014 declined from the previous midterm election, even though total cost of the election went up.¹⁶ In response to a 2012 poll conducted on behalf of the Brennan Center, 26 percent of respondents said that they were less likely to vote because big donors to super PACs have so much more influence than average Americans.¹⁷

Could super PACs be banned if *Citizens United* and *SpeechNow* were reversed? Yes. In fact, the first court to hear the *SpeechNow* case held that the First Amendment did not provide the plaintiffs with the right to create super PACs. The court noted that at that time, the Supreme Court “ha[d] never held that, by definition, independent expenditures pose no threat of corruption,” and that a group’s legal “independence” does not prevent it from forming close ties with officeholders that could lead to corruption.¹⁸ If a new Court were to accept this reasoning—or any of the justifications offered by multiple legal scholars—it could restore the ban on super PACs by upholding the \$5,000 limit on donations to political committees. Congress or the Federal Election Commission (FEC) could do the same if the Court overruled *Citizens United*.

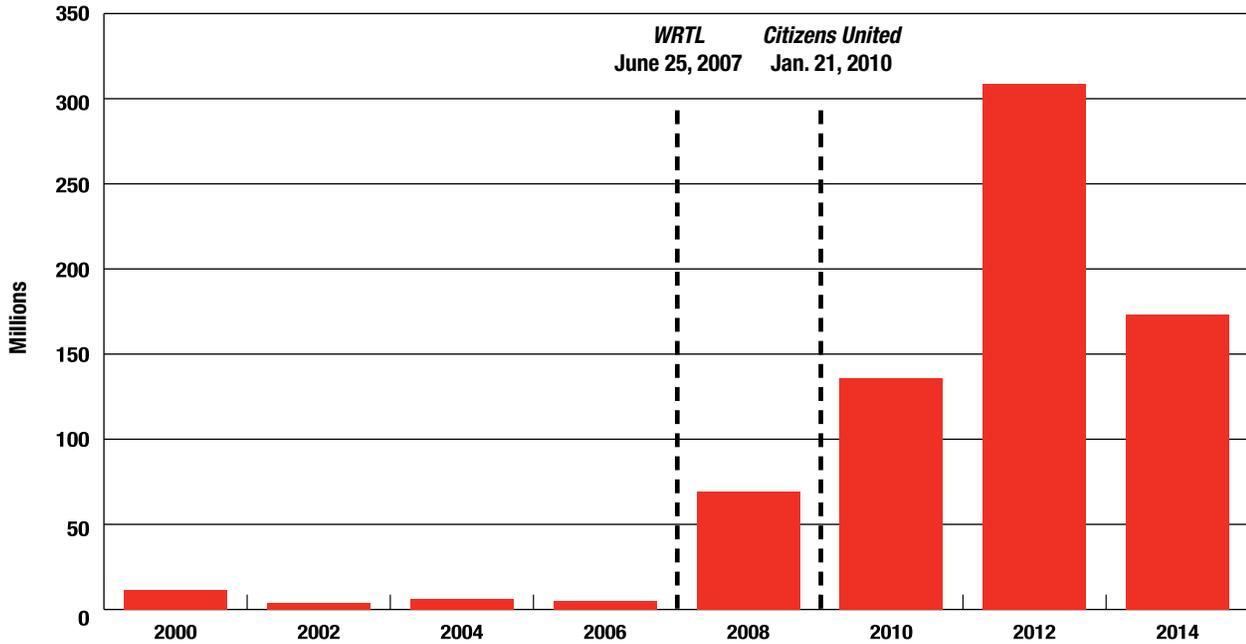
B. PAVING THE WAY FOR DARK MONEY

Commentators and politicians across the political spectrum have decried the rise of secret, unaccountable money. New Jersey Governor Chris Christie lamented the fact that, because people “set up secret groups that don’t have to disclose their donors, . . . you don’t know who’s running the ads.”¹⁹ Senate Minority Leader Harry Reid (D-Nev.) said “the flood of dark money into our nation’s political system poses the greatest threat to our democracy” he has seen during his tenure.²⁰ Though the Roberts Court has directly invalidated several types of campaign finance laws, it has always upheld disclosure rules, usually offering a strong endorsement of their value and constitutionality. In *Citizens United*, the Court rejected the challengers’ objections to federal disclosure rules, explaining that “[t]he public has an interest in knowing who is speaking about a candidate shortly before an election.”²¹ Yet ironically, *Citizens United* and its predecessor *Wisconsin Right to Life* (*WRTL*) created the conditions that led to the rise of dark money.

WRTL was decided in 2007 by a 5-4 vote in which there was no majority opinion on several key points, meaning that the controlling opinion of Chief Justice John Roberts effectively became the law. Roberts’ opinion held that corporate and union campaign spending could be prohibited only if their ads contained “express advocacy” — ads explicitly calling for the election or defeat of a named candidate — or its “functional equivalent” — ads using terms that are susceptible of no other reasonable interpretation.²² This left a gaping loophole for unlimited spending on “issue advocacy” — ads ostensibly made to educate voters on issues of the day, but frequently used to evade classification as express advocacy.

Worse, outside groups seized on this bright-line rule to avoid disclosure. They argued, with the support of half the FEC, that provided they were not spending extensively on express advocacy, they did not need to register as political committees. Yet status as a political committee triggers most campaign finance disclosure obligations. While there are also some per-communication disclosure requirements, FEC rules have made those exceptionally simple to evade as well. As a result, money contributed to outside groups is easily concealed and the “prompt disclosure” imagined by the Roberts Court is often illusory.²³ In 2008, the first election after *WRTL*, reported federal dark money spending increased from almost nothing to about \$70 million. It continued to rise quickly, reaching almost \$310 million in 2012.²⁴

Outside Spending by Nondisclosing Groups, Excluding Party Committees



Information from the Center for Responsive Politics²⁵

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Congress could certainly prevent most undisclosed political spending, and it almost did so in 2010.²⁶ Yet congressional inaction, compounded by continued FEC gridlock and complexity created by cases like *WRTL*, means that federal disclosure laws have been largely ineffectual for several election cycles. This is not entirely the Court's fault, of course. But despite the justices' praise for disclosure, the fact remains that Supreme Court rulings allowing unlimited outside spending bear significant responsibility for the lack of transparency in recent elections.

C. ALLOWING UNLIMITED CORPORATE AND UNION SPENDING

Citizens United is perhaps best known for declaring that corporations (and, by extension, labor unions) have a First Amendment right to spend unlimited money on elections. The result was unsurprising for some, since three years earlier the Court had limited the ban on corporate and union spending in *WRTL*.²⁷

In addition to unleashing unlimited spending by super PACs often largely funded by wealthy individuals, *Citizens United* has also led to significant corporate spending in elections. In the 2014 election, several outside groups relied almost solely on six-and-seven-figure donations from corporate entities, unions, or other groups. For example, one super PAC supporting then-Senate Minority Leader Mitch McConnell (R-Ky.) took \$300,000 from Murray Energy Corporation, the nation's largest privately owned coal company, while a Michigan group was funded with \$1.3 million from labor organizations.²⁸ Corporate political spending is often difficult to track, but IRS data shows that major corporations gave at least \$173 million to non-profit groups that spent money in the 2012 election, including \$16 million to the Blue Cross Blue Shield Association and \$11.2 million to the U.S. Chamber of Commerce, both of which are consistently significant election spenders.²⁹

While corporations and unions certainly spent in elections prior to *WRTL* and *Citizens United*, there were strict limits on the kind of spending in which they could engage. Congress first restricted corporate spending on elections in 1907 with the Tillman Act, which, Justice Souter noted in his *WRTL* dissent, prevented corporations from making any “money contribution in connection with any election to any political office.”³⁰ Almost 100 years later, the Bipartisan Campaign Reform Act (BCRA) barred corporations and unions from using funds from their general treasuries to buy pre-election broadcast ads that target specific federal candidates. These rules prevented corporations from spending huge sums on federal elections — until they were dismantled by *WRTL* and *Citizens United*.³¹

The Supreme Court could return to a jurisprudence that recognized in 1990 the “corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form.”³² Justice Stevens, writing for the four dissenting justices in *Citizens United*, recognized “why corporate electioneering is not only more likely to impair compelling governmental interests, but also why restrictions on that electioneering are less likely to encroach upon First Amendment freedoms.”³³ He also explained the majority's failure to properly protect the rights of shareholders, “who are effectively footing the bill” for a corporation's political spending even if they “find their financial investments being used to undermine their political convictions.”³⁴ A new Supreme Court approach could return us to the time less than ten years ago when restrictions on corporate and union spending in elections were valid and enforceable.

D. RADICALLY INCREASING THE TOTAL SIZE OF CONTRIBUTIONS TO CANDIDATES AND PARTIES

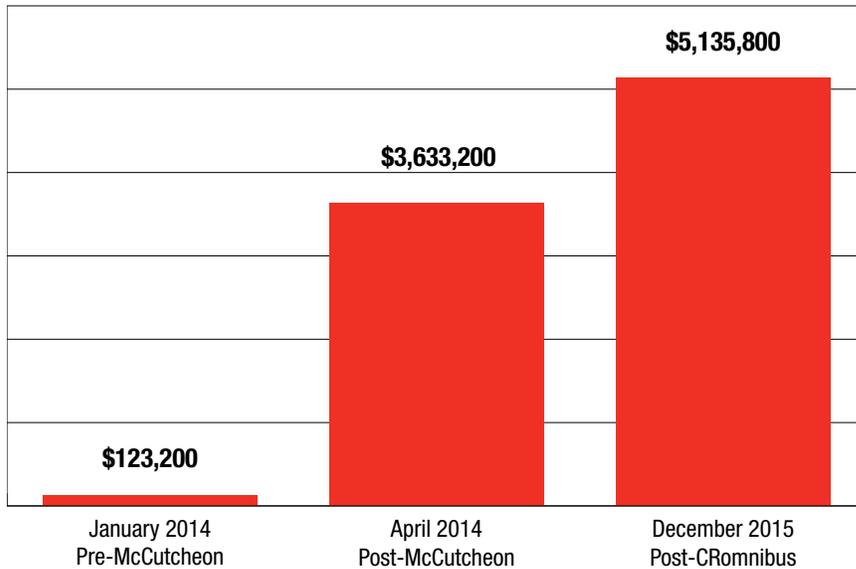
Fifty-three donors each gave more than \$250,000 to candidates and political parties during the 2014 cycle, more than double what anyone could give in the previous election.³⁵ Both the numbers of large donors and the size of their donations will no doubt be substantially greater in 2016. That's because donors were freed by the Supreme Court to give such high amounts only seven months before Election Day 2014. In 2016, rich donors will have the entire election cycle to reach for their checkbooks.

In *McCutcheon v. FEC*, the Court struck down a major limit on political contributions and reiterated that campaign finance limits may only be used to protect against quid pro quo corruption, “a direct exchange of an official act for money.”³⁶ Prior to the decision, donors were limited to giving about \$123,000 in a single election cycle to all federal candidates and parties combined. In *McCutcheon*, however, the Court said that a wealthy donor contributing more than this amount carries no risk of corruption. There are already limits on the amount a donor can give to a single candidate, the Court said. Since those limits prevent contributions from getting so large as to pose a risk of corruption, other contributions to more candidates carry no additional risk.

Justice Breyer, writing on behalf of the four-member dissent, offered an alternative vision of what the Court was doing, and how he and his three colleagues would decide such questions if they had the majority. “[This is] a decision that substitutes judges’ understanding of how the political process works for the understanding of Congress; that fails to recognize the difference between influence resting on public opinion and influence bought by money alone; that overturns key precedent; that creates huge loopholes in the law; and that undermines, perhaps devastates what remains of campaign finance reform.”³⁷

Justice Breyer’s warnings have been substantially borne out. In practice, many mega-donors do not make these contributions through individual checks to individual candidates. Instead, they hand over massive checks directly to party leaders who oversee joint fundraising committees, who then distribute the money. As the chart below details, the Court freed rich donors to give these committees a single check of more than \$5 million depending on how many candidates and party organizations these committees include. These giant checks are not the “wild hypotheticals” Justice Alito suggested during oral argument; both parties have already solicited donations of more than \$1.3 million per couple.³⁸ Congress furthered the potential for these large contributions by including in the 2014 continuing resolution omnibus (“CRomnibus”) bill new party accounts able to receive contributions of more than \$100,000 each.³⁹

Changing Maximum Federal Contributions



Information from Federal Election Commission⁴⁰

The only donors affected by *McCutcheon* are the handful wealthy enough to contribute more than \$123,200 in an election cycle. Those donors quickly took advantage of the loosened rules. In the seven months between the *McCutcheon* decision and Election Day 2014, 683 donors surpassed the old limits, contributing more than \$35 million to candidates, parties and PACs that otherwise would have not been allowed.⁴¹

How Much an Individual Donor Can Contribute to a Political Party and its Federal Candidates in 2016 Cycle

Recipients	2016 Base Limit	Total/cycle
Presidential Candidate	\$5,400/cycle	\$5,400
435 Candidates for House of Representatives	\$5,400/cycle	\$2,349,000
33 Candidates for Senate	\$5,400/cycle	\$178,200
3 National Party Committees	\$33,400/year	\$200,400
7 Special National Party Committee Accounts	\$100,200/year	\$1,402,800
50 State Party Committees	\$10,000/year	\$1,000,000
Total = \$5,135,800		

Information from Federal Election Commission⁴²

The dissenting justices would have left the overall limit in place, and pressed the majority to rethink the interests at stake. These justices saw a significant risk that outsized individual contributions would undermine the integrity of the political process, an integrity the First Amendment was designed to protect. “The First Amendment advances not only the individual’s right to engage in political speech,” Justice Breyer wrote, “but also the public’s interest in preserving a democratic order in which collected speech *matters*.” Massive contributions weaken this link between public opinion and political action by making public opinion harder to hear. Recognition that the Constitution protects the public’s ability as a whole to make their views known could reverse the last decade of Supreme Court jurisprudence.

E. RAISING BARRIERS TO PARTICIPATION BY REGULAR CITIZENS

Not all campaign finance reforms of the last few decades have been about limiting spending in elections. Some have been about ensuring that those who are not wealthy, or connected to the wealthy, can also run competitive political campaigns. But here too, the Court has substantially undermined reforms.

The need to be wealthy or court the wealthy to get elected has inevitably had consequences, not only for voter choice, but for policy. As former U.S. Rep. Tom Perriello (D-Va.) put it, reliance on big donations and/or self-funding to run successful campaigns causes representatives bring with them to Washington “a distorted view of a district’s economic wellbeing.”⁴³ He recalled in particular a debate over a potential tax increase for individuals making more than \$250,000 which was skewed by the fact that “members of Congress returning to their districts were more likely to hear from friends and neighbors—typically lawyers, bankers, and other professionals—about the looming tax increase than the jobs crisis facing the working and middle class.”

In *Davis v. FEC* in 2008, the Court made it harder for candidates who are not wealthy to compete with wealthy, self-funding candidates. Ever since the Court held in *Buckley v. Valeo* in 1976 that campaign spending cannot be limited, candidates using their own money have had a significant advantage over those candidates who must rely on contributors. Among other things, these self-funders need not worry about contribution limits. This has contributed to a Congress increasingly dominated by the rich. In inflation-adjusted dollars, the median net worth of a member of Congress has steadily increased from \$304,000 in 1984 to more than \$1 million in 2013.⁴⁴ In 2014 alone, at least 24 congressional candidates contributed more than \$1 million to their own campaigns.⁴⁵

Congress had attempted to deal partially with this in BCRA by passing the “Millionaire’s Amendment,” which was meant to “reduce the natural advantage that wealthy individuals possess in campaigns for federal office.”⁴⁶ The provision allowed non-self-financing candidates to temporarily collect contributions above the normal contribution limits if an opponent contributed more than \$350,000 to his or her own campaign.

But five Supreme Court justices said the goal of reducing the natural advantages of wealthy candidates is illegitimate.⁴⁷ They held that that the law unconstitutionally punished wealthy candidates for exercising a First Amendment right — the right to spend unlimited amounts of their own money. The dissenting justices, on the other hand, recognized that voters cannot make informed choices when “only one candidate can make himself heard,” and that the law did “no more than assist the opponent of a self-funding candidate in his attempts to make his voice heard.”⁴⁸

It is difficult to assess the effectiveness of the Millionaire’s Amendment because it was in place for only two election cycles. However, in 2006, when the provision was still in place, only 12 percent of self-funded congressional candidates won their elections. Yet when the Millionaire’s Amendment was invalidated, the success rate of self-funders jumped to 20 percent in each of the next three elections.⁴⁹ Either by dissuading some non-wealthy candidates from running or by allowing rich candidates to outspend their opponents, *Davis* appears to have improved the chances of self-financed candidates.

Even though *Davis* concerned privately-funded candidates, the Court’s reasoning was extended by lower courts to significantly weaken certain public financing programs. In Florida and Connecticut, this meant striking down parts of public financing systems in which publicly-funded candidates received additional funds when their privately-funded opponents spent above certain amounts.⁵⁰ New Jersey went even further: the legislature was considering expanding a public financing program which included a similar provision, but decided they had to suspend the program entirely as courts wrestled with the meaning of *Davis*.⁵¹

The Supreme Court resolved this uncertainty in 2011 by striking down part of Arizona’s public financing system, making it harder to compete with big-dollar donors.⁵² In a 1998 referendum, Arizona voters adopted a voluntary public financing program which, in exchange for funding, required candidates to collect a specified number of five-dollar contributions and limit their expenditures. Participating candidates also received protections against privately-funded opponents using large amounts of money. If the opponent raised more than the public financing system provided, the state matched that excess amount dollar-for-dollar up to twice the amount of the initial grant (money often called “trigger” funds).⁵³ In *Arizona Free Enterprise*, the Court ruled that this protection, like the one at issue in *Davis*, violated the First Amendment by unfairly penalizing the privately-funded candidate.⁵⁴

Four justices strongly disagreed with this decision, offering an alternative understanding of why these kinds of subsidies of speech should be allowed: because they increase the amount of speech, permitting those without the support of wealthy interests to be heard. “[T]o invalidate a statute that . . . only provides more voices, wider discussion, and greater competition in elections — is to undermine, rather than enforce, the First Amendment.”⁵⁵

The Court’s decision to remove one of the Arizona program’s most important provisions had an immediate impact. The trigger funds ensured candidates participating in the program could run competitive campaigns even against candidates who relied on private donors.⁵⁶ In 2012, the first election after the ruling, 18 candidates who had previously been elected using public financing switched to private funding.⁵⁷ In 2010, when *Arizona Free Enterprise* was pending and trigger funds were still thought to be available, both major party gubernatorial candidates used public financing.⁵⁸ Four years later, neither did.⁵⁹ The Court’s decision had ripple effects across the country as candidates in Maine and North Carolina began to abandon public financing programs in increasing numbers.⁶⁰

Arizona⁶¹

	Primary Election Participation by All Candidates	General Election Participation by All Candidates
2006	60%	60%
2008	62%	66%
2010*	45%	49%
2012	38%	37%
2014	32%	28%

**Arizona’s trigger funds were first suspended in June 2010 while Arizona Free Enterprise was pending*

Maine⁶²

	Percent of General Election Legislative Candidates Participating in Maine Clean Elections
2006	81%
2008	81%
2010	77%
2012*	63%
2014	51%

**2012 was the first election in Maine without trigger funds*

The Supreme Court decisions did not undermine all public financing systems. Programs in New York City and Connecticut that do not rely on trigger funds continue to thrive. In 2013, New York City's program saw a 92 percent participation rate during the primary and 72 percent during the general election.⁶³ One year earlier Connecticut saw record participation in its program.⁶⁴

Voters and elected officials are pursuing additional ways to amplify the voice of regular citizens after *Davis* and *Arizona Free Enterprise*. This November, residents of Maine voted via referendum to revive the state's clean elections program by increasing disclosure by outside spenders and granting supplemental funds to candidates who collect additional small contributions.⁶⁵ In Congress, Rep. John Sarbanes (D-Md.) authored a bill that would establish a fund to match low-dollar contributions and also provides supplemental funds to candidates who collect additional small contributions in the last 60 days of a general election.⁶⁶ Meanwhile, Reps. David Price (D-N.C.) and Chris Van Hollen (D-Md.) introduced a bill that would increase the public funds available through the presidential public financing system and eliminate spending limits for candidates who agree to accept contributions of no more than \$1,000.⁶⁷

It should be possible to rehabilitate some public financing systems or structure new ones in a way that does not violate *Arizona Free Enterprise*. However, a reversal of this decision — one that allows candidates with sufficient support to receive funds to partially offset high private spending — will lower one of the most significant barriers discouraging ordinary Americans from running for office (namely, the ability of other candidates to self-fund or raise money from a few exceptionally wealthy donors), and strengthen the ability of all people to have their voices heard by giving them more choice.

CONCLUSION

In the last nine years, six Supreme Court decisions have wreaked havoc on the nation's campaign finance laws, opening the door to super PACs and corporate spending, creating new channels for wealthy donors and candidates to influence elections, and weakening programs meant to lower barriers for ordinary Americans to run for office.

All of them were decided by just one vote.

The Court also undermined future attempts at reform by stating that while campaign finance regulations are permissible if they target corruption of the political system, corruption can only mean a “quid pro quo” deal, not the broader influence that results from big spending. According to the Roberts Court, using donations to buy “ingratiation and access . . . [is] not corruption,” because ingratiation and access “embody a central feature of democracy.”⁶⁸

There are few issues in the last decade on which the Court has been so consistently, bitterly and closely divided. Four justices on the Supreme Court strongly disagree with the majority's cramped vision of our Constitution and democracy. Justice Ginsburg recently echoed the opinion of most Americans when she decried “what has happened to elections in the United States and the huge amount of money it takes to run for office.”⁶⁹ She argued that eventually, “sensible restrictions” on campaign financing will again be in place because “[t]he true symbol of the United States is not the eagle, it's the pendulum — when it swings too far in one direction, it will swing back.”⁷⁰

On the Court, that swing back only requires one new or existing justice to adopt the approach of four current members. A shift in the Court could permit Americans to take back their democracy in a way that is more consistent with the Constitution's true meaning, which allows for reasonable regulation of big money in politics. To be sure, state and federal legislators would need to pass new laws to regain the ground that has been lost, and mere reversal of campaign finance decisions of the last eight years would not solve all of the problems of excessive influence. Because of older Supreme Court decisions, for example, new laws still could not limit the total amount of spending in any election.

Still, it is no exaggeration to say that the next appointments to the Supreme Court will have a profound impact on political power in the United States. Appointment of one or more justices who agree with the five-member majority may solidify our “new normal” for decades to come. By contrast, appointment of one or more justices who share the vision of the Court's four-member minority could bring substantial power over elections and the political process back to ordinary Americans. That moment of truth is likely to come far sooner than most Americans realize.

ENDNOTES

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